No. 3411

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Appellant,

vs.

DOMINION OIL COMPANY, GENERAL PETROLEUM COMPANY, BANKLINE OIL COMPANY, STANDARD OIL COMPANY, GENERAL PIPE-LINE COMPANY OF CALIFORNIA, INDEPENDENT OIL PRODUCERS' AGENCY, GENERAL PETROLEUM CORPORATION, PRODUCERS' TRANSPORTATION COMPANY, BRITISH-AMERICAN OIL COMPANY, NORTH MIDWAY OIL COMPANY, SUSAN ELLIOTT, A. B. PERKEY, F. J. ELLIOTT, JOHN BARNESON, AND WILLIAM WALKER,
Appellees.

Appeal from the United States District Court for the Southern District of California, Northern Division.

Brief for Appellant.

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Statement of the Case.

This is a suit in equity brought by the Government to restrain continuing waste and depletion of the oil contents of a tract of the public land described as the Northwest Quarter (NW ¼) of

Section Fifteen (15), Township Thirty-one (31) South, Range Twenty-two (22) East, Mount Diablo Base and Meridian, and for other relief. The legal title to this land is in the United States. It is included within the area described by the Presidential withdrawal order of September 27, 1909. No discovery of oil or gas had been made on this land at the date of said withdrawal order, nor had drilling for oil then been commenced thereon. It had been claimed as an oil placer mining claim by the posting and recording of notices of location in the names of eight persons at one minute past twelve o'clock on the first day of January, 1908.

In December, 1907, one A. H. Butler, who was familiar with the supposed oil lands of that region, told William Z. McDonald and ex-Senator Stephen W. Dorsey that he knew of a lot of lands which had been located, but upon which the prior locators had "fallen down," and which could be re-located at the end of the year; that he had all the necessary information, including surveys, that would make it possible to locate, and proposed that the land be re-located and that he, Butler, be given a twenty per cent. interest in all lands so located in consideration of the information furnished by him. They all apparently had the mistaken idea that locations were good, even though without discovery, until the end of the year, at which time the lands

would be forfeited and could be re-located unless assessment work had been done, as it had not been done in the case of the lands in question. (Printed Record, pp. 424, 425, 455, 508-510.)

McDonald and Dorsey got together a few associates, who agreed to put up all money necessary for the expense of making the locations; they made use of about twenty-one persons, including some of themselves, with surveyors and a man to keep track of expenditures and supplies, and took them in eight automobiles on the night of December 31, 1907, to post location notices upon 207 quarter sections, including the quarter involved in this case (R., 442). The notices of these locations bore date as of one minute after twelve o'clock on the morning of January 1, 1908, and were recorded the next day (R., 221). These locations were all made as a part of one transaction, the names of the twenty-one persons being used indiscriminately, one of these names being used only upon seven of the locations and two of the names being used upon 201 of the locations. (See detailed statement, R., pp. 551-566.)

The evidence shows that all these locations were made in the interest of an association or syndicate consisting of six groups claiming interests as groups, the first group consisting of Butler and his wife and son. This group was to receive benefits in the

proportion of 20 per cent. of all that might come from the scheme. The five other groups were each to get one-fifth of the remaining 80 per cent., or 16 per cent., each, of these benefits. They were known as the Dorsey group, consisting of Senator Dorsey, his wife, and Mr. Haldeman; the Elliott group, consisting of Elliott and Davis; the strong group, consisting of Strong, George W. Dickinson, and L. W. Andrews; the McDonald group, consisting of Dr. W. Z. McDonald and his son; and the Jones group, consisting of ex-Senator Jones and his son (R., 421, 482). The various members of each group expected benefits in the proportion agreed upon among themselves from the shares of their respective groups, and there were some fifteen persons in all interested in the groups. About twenty-five hundred dollars was contributed by certain members of these groups to cover the expense of the proceedings (R., 426 and 495, ffg.). The greater part of the names used in making the locations were those of persons who were not members of any of the groups and who did not claim or expect any interest in or benefit from the locations. They simply allowed their names to be used as an accommodation to friends without knowing, or inquiring, for whose benefit the use of their names was made. (See testimony of witnesses Gebauer, R., 369; Shaw, R., 371-372; Musser, R., 437, and Casey, R., 474.)

Eight out of the fifteen persons who claimed an interest in the various groups participated to some extent in making the locations; the other seven participated in none of them. But those who were in the groups and whose names appeared upon the notices of location testified that they did not claim any interest by reason of the fact that their names appeared upon particular locations. Their names were used to make locations in the interest of the syndicate exactly as the names of those who claimed no interest whatever were used, namely, to obtain and hold the locations for the benefit of the association or syndicate, as above stated; those whose names appeared on none of the locations getting their proportion as well as those members of the groups whose names were actually used (R., 431-432, 453, 454, 460).

The testimony shows that the scheme was somewhat hurriedly gotten up, so that no exact plan had been agreed upon as to how the association should be organized or title held at the time the locations were made (R., 428, 451, 491). After the locations were made they began to talk about the arrangements for vesting and holding them, the talk being at first of organizing a company under the laws of Arizona; whereupon Doctor McDonald suggested that there was a corporation already

organized, but without assets or liabilities, known as the British-American Oil Company, which corporation was lying dormant and could be used, thus saving the expense of organizing a new one. It was thereupon agreed to adopt that suggestion, to have the few outstanding shares of stock in that company assigned to members of the groups to qualify them for directors, and to have the existing directors resign, except McDonald, and members of the groups put in their places (R., 422-423, 427, 451, 465-466).

Pursuant to this plan, corporate meetings of the British-American Oil Company were held on the third day of February, 1908, putting in the new directors and accepting a proposition made by Strong and Elliott, claiming to be trustees, to the British-American Oil Company, that they would transfer the 207 oil claims covered by the location notices above referred to upon the issuance to them of the entire outstanding capital stock of the British-American Oil Company, and upon the agreement by the British-American Oil Company to convey 640 acres each to Strong, McDonald, Dorsey, Jones and Elliott of land to be selected by them, and "from the first proceeds of the sale of any part of the remaining portion of said property" to pay $2,500 to Strong, Dorsey, and Jones, whose groups had been shown to have subscribed that sum. The

proposition of the trustees was accepted by the directors; and the stockholders, who were then no other than the directors, ratified the proceeding (R., 386-397). The deed was not made, however, by the trustees until a year afterward, on the fourth day of May, 1909 (R., 260), and no stock was issued until March, 1910 (R., 414).

Pursuant to this plan, the twenty-one persons whose names appeared on the locations, by deed dated March 4, 1908, quit-claimed to Frank R. Strong and M. Z. Elliott, trustees, the 207 locations (R., 223), the deed not being recorded until the 27th of May, 1909, at the same time as the deed from the trustees to the British-American Company (R., 259, 296). No declaration of trust is contained in the deed from the locators to the trustees or from the trustees to the British-American Company other than the description of Strong and Elliott as trustees. The various locators testified that no explanation was made to them, or indeed asked by them, as to the nature of the trust; and it is admitted that there was no statement of it and that the trust was not for the benefit of the locators; but the intention was that it should be for the persons composing the various groups in the proportion in which they were to have stock in the British-American Oil Company (R., 493, 502-506).

Up to this time nothing had been done toward development; nor did the association or the British-American Oil Company or the trustees ever drill upon this or any of the 207 locations (R., 507). The corporation records of the British-American Company show that at a meeting on June 12, 1909, the question of maintaining possession of some of the claims was taken up and the president was authorized to use his judgment about taking steps to "maintain possession" of Sections 10 and 15 and "any other lands of the Company where there is adjacent development" (R., 405). At a meeting on September 11, 1909, there was reference to the right of the British-American Company to be reimbursed if it erected derricks or made expenditures in order to "protect" the NW ¼ of Section 15 (R., 411). At a meeting held on September 27, 1909, the attorney for the Company was instructed to draw a lease in favor of George W. Dickinson for the NW ¼ of Section 15, with an option to purchase, which lease was made and is spoken of by counsel as the beginning of the defendants' chain of title (R., 412). This lease appears at pages 296-300 of the record and calls for the commencement of the drilling of a well on the property within one year from its date, the 27th of September, 1909. That lease was recorded September 12, 1910, and bore upon it an undated assignment of

the lease by George W. Dickinson, the lessee, to the North Midway Oil Company (R., 301). The record shows that the North Midway Oil Company was organized November 8, 1909, by Elliott, McDonald, Jones, Strong, Andrews, Dickinson, and Roy Jones (R., 516). A lease was authorized by that company and made on November 20, 1909, to one McDonald, providing for the drilling of a well upon the quarter-section in question. This lease was recorded April 1, 1911, and bore upon its margin a partial assignment, undated, to T. R. Finley and others. Under this lease the Dominion Oil Company, the defendant which ultimately did the drilling and made the discovery on this land, claims; and on this drilling and discovery all the other claimants to parts of this land base their title (R., 303, 315).

On September 17, 1909, rig lumber—but not sufficient in amount for a rig—was placed upon the land here involved by order of A. H. Butler, Jr., who claimed to have put it there as one of the stockholders of the British-American Oil Company, evidently in order to "maintain possession" or "protect" the property pursuant to the resolutions hereinabove referred to; not for the British-American Company as such, but with the purpose of saving the property for such of the stockholders of the British-American Company as might see fit

to join him in the enterprise (R., 582-587). See also testimony of Roy Jones (R., 525-529), to the effect that there was talk about raising money by these stockholders, but that none was actually raised or subscribed, but that they "got out from under and subleased to Joe McDonnell." Neither Mr. Butler nor his associates did any drilling, but the lumber placed there by his order was afterwards paid for by the Dominion Company, which did the drilling (R., 525-527).

Some time in September, 1909, after the lumber had been placed upon the property, Joseph P. McDonnell and W. O. Maxwell, while looking for oil property, were informed by one Frazier "that Butler was offering a lease on this particular property" (R., 602). Butler was claiming to represent the British-American Oil Company, and a preliminary agreement was entered into between him and McDonnell, the latter thinks a day or two after the lumber had been delivered, under which McDonnell was to pay $3,000 for the lease. This was followed by the lease afterward made by the North Midway Oil Company, which was not in existence at the time of Butler's negotiations, but was subsequently organized and took by assignment from Dickinson the lease to him authorized and dated on September 27th (R., 590, 602-603).

McDonnell and Maxwell then made arrangements to have drilling equipment set aside for them (R., 591), which, however, they neither obtained nor paid for; but later, at a date which is not quite certain, they sold a 40-acre interest to the defendant, the Dominion Oil Company, upon the agreement on its part to pay for all material furnished or ordered and to drill a well upon the land. On or about December 10, 1909, a well was spudded in and on Christmas eve or Christmas day of 1909 oil was found. Upon this discovery of oil by the Dominion Company rests the entire claim of all the defendants who claim any interest in the quarter-section here in question.

The documentary evidence shows neither lease nor authority for a lease until the 27th day of September, 1909, the day of the withdrawal, when the British-American Oil Company authorized a lease, which was executed under that date to Dickinson, requiring the drilling of a well within one year. There is no evidence that Dickinson ever did anything toward the drilling. But it is claimed that through subsequent assignments to the North Midway Company, subsequently organized, and through the lease made by that Company on November 20th to McDonnell and transferred by him in part to the Dominion Company, the placing of lumber on the property on September 17th was the

beginning of work leading to the discovery of oil on Christmas eve, 1909, by the Dominion Oil Company.

The evidence shows, too, that at about or soon after the time the lumber was placed upon the property certain men were sent there (R., 581) primarily as watchmen, who were doing nothing except to serve as watchmen, meaning, of course, to "maintain possession" of and "protect" the property; although it is claimed that these men were afterward put to work cutting sagebrush and doing "a little pick and shovel work on the roads," getting them ready for hauling. No date is fixed for the commencement of such work, but it was evidently after the withdrawal; certainly it is not shown that it was before it. (See R., 354, 357, 581, 597, 607, 611, 612.)

Upon this testimony the Court found that work leading to the discovery of oil on the land had been commenced and was in progress at the time of the withdrawal and continued to discovery (R., 199-200); that the evidence failed to show that the locations were made on behalf of the British-American Oil Company, but that, on the contrary, the defendants and those under whom they claim were bona fide occupants and claimants at the date of the withdrawal (R., 199). Upon petition for rehearing the Court held that, although the locations were made in behalf of the association or

syndicate of fifteen persons by the use of the names of persons who had no interest and did not know for whom their names were used, that would not invalidate their action; and that the locations were not invalid, even though the parties for whose benefit they were made did not intend to develop the property, but made the locations with the purpose and expectation of selling and disposing of some of them to other parties and profiting thereby (R., 212, 213).

It seemed to the Government that the evidence, instead of showing diligent work of development, plainly showed that the placing of lumber and watchmen upon the property on the 17th of September, 1909, was simply a move in the interest of certain stockholders of the British-American Company to maintain possession of and protect the property as against jumpers, who were shown to be active in that region (R., 354, 586, 597, 612), while these stockholders tried to find someone who would undertake to drill and were "offering a lease" upon the property (R., 602). The Court, however, found that that was the beginning of diligent work which went on and was properly connected with the work of the Dominion Company, which later drilled the well and made the discovery.

Argument.

There are three questions which we wish to present for the consideration of this Court. The assignments of error are numerous, but they are merely different ways of presenting these three questions.

The first is, whether the Court was warranted in holding that the claimants were bona fide claimants or occupants in diligent prosecution of work leading to discovery of oil or gas upon the property at the date of the withdrawal order within the meaning of the Pickett Act.

The second is, whether the Court was warranted in holding that the location was valid, notwithstanding the fact that it was made in behalf of an association or syndicate, acting as a unit, but not then in corporate form, by using the names of persons who had no interest in the location and did not know for whose benefit their names were being used.

The third question is whether the Court was warranted in holding that the locations were not invalid, even though the parties for whose benefit it was claimed they were made did not intend to do anything to develop the property, but made the locations with the purpose and expectation of selling and disposing of some of them to other parties and profiting thereby.

The Defendants Had No Rights Which Were Saved by the Proviso of the Pickett Act.

The familiar proviso of the Pickett Act is as follows:

> Provided, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands and who, at such date, is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work. (36 Stat. 847.)

It was admitted that there was neither discovery nor drilling upon the quarter section involved in this suit prior to the withdrawal, and that nothing had been done prior to withdrawal except to place thereon on the 17th of September, 1909, certain lumber, insufficient in amount for a drilling rig, and then, or shortly thereafter (whether before or after the withdrawal is not clear), to place certain men upon the property, at first and primarily as watchmen, and afterward put to work at grubbing sagebrush, digging holes and doing a little road work. It is submitted that the evidence plainly shows that this was done, not as a beginning of the work of drilling, but to maintain possession of and protect the property while offering a lease to any

one who could be found to take it and agree to develop the property. It was not done by or in the interest of the British-American Company, which then claimed the property, but in the interest of certain stockholders, who wished to save it and to that end ordered the lumber and placed the watchmen, and after ordering the lumber, arranged with McDonnell that he take a lease. After that arrangement was made, these stockholders got the British-American Company to make a lease to Dickinson on the very day of the withdrawal, September 27th; and on November 8th, organized a company of their own, the North Midway Oil Company, which took the assignment of the Dickinson lease, and on November 20th, executed a lease to McDonnell. Neither the British-American Company nor its stockholders, nor Dickinson, nor the North Midway Company, nor McDonnell, ever did any drilling upon the property; but McDonnell entered into a further arrangement with the defendant, the Dominion Company, under which it agreed to repay the small expenses already incurred and to develop the property, which it subsequently did.

For these reasons, and in view of the facts set forth in our Statement of Facts, which need not be here repeated, it is submitted that there were no bona fide occupants or claimants at the date of the withdrawal order, and that no one was doing work

diligently or otherwise leading to the discovery of oil or gas upon the property.

Claimants or occupants to be bona fide claimants or occupants must have a bona fide purpose to comply with the law by doing the work required to make valid the paper location under which they claim. The corporate proceedings of the British-American Company as to reimbursement of the early location expense out of sales of property: as to the reimbursement of those who might "maintain possession" of or "protect" the property; the seeking to find some one who would take a lease and the entire lack of any drilling or obligation to drill on the property, by anybody, prior to the withdrawal and until the Dominion Company took hold some time after November 20th, show that the claimants did not intend to develop and were not bona fide claimants or occupants within the meaning of the law at the time of the withdrawal. In other words, they not only did not do or intend to do diligent work leading to discovery themselves, but their purpose was to prevent others who had a lawful right to enter upon and develop it from doing so without first paying tribute to them.

It is submitted that the same facts show that there was no work going on diligently or otherwise, leading to the discovery of oil or gas upon the

property at the time of the withdrawal. The most that can be said is that there was a lumber pile upon the property, with perhaps watchmen to take care of it, while the stockholders of the British-American Company or McDonnell and Maxwell were figuring on material or labor or were in search of capitalists who might be willing to undertake to develop the property.

In the much quoted case of *McLemore* v. *Express Oil Co.,* 158 Cal. 559, it is said:

> What the attempting locator has is the right to continue in possession, undisturbed by any form of hostile or clandestine entry, while he is diligently prosecuting his work to a discovery. This diligent prosecution of the work of discovery does not mean the doing of assessment work. It does not mean the pursuit of capital to prosecute the work. It does not mean any attempted holding by cabin, lumber pile, or unused derrick. It means the diligent, continuous prosecution of the work, with the expenditure of whatever money may be necessary to the end in view.

In *Borgwardt* v. *McKittrick,* 164 Cal. 650, it was said that the right of the locator was to be "fully protected against all forms of forcible, fraudulent, surreptitious, or clandestine entries and intrusions upon his possession," so long as he "remains in possession, and with due diligence prosecutes his work toward a discovery," and that "figuring with other persons by a locator as to what they will

charge for the doing of such work, or the making of an effort to find some one who will do such work at a price satisfactory to the attempting locator, * * * cannot be held to constitute a diligent prosecution of the work of discovery any more than the pursuit of capital to prosecute such work can be held to constitute such diligent prosecution."

See also *Miller* v. *Chrisman,* 140 Cal. 440 (affirmed in 197 U. S. 313),
Weed v. *Snook,* 144 Cal. 439,
Whiting v. *Straup,* 17 Wyo. 1.

Recently, the United States Supreme Court has discussed the question, and, after citing with approval the cases of *Miller* v. *Chrisman, Weed* v. *Snook, Whiting* v. *Straup,* and *McLemore* v. *Express Co.,* above cited, said:

> Whatever the nature and extent of a possessory right before discovery, all authorities agree that such possession may be maintained only by continued actual occupancy by a qualified locator or his representatives engaged in persistent and diligent prosecution of work looking to the discovery of mineral.

Union Oil Co. v. *Smith,* 249 U. S. 337, 348.

In the case at bar there was no discovery at the time of the withdrawal and the Government had an absolute right to withdraw the property from entry. The Government had withdrawn it, but by virtue of the Pickett Act the rights of those persons, if

any, who were bona fide occupants or claimants and were doing certain things were saved. It is for the defendants to show that they were such bona fide occupants and claimants and were diligently at work as required; and unless they do show that, no rights are saved to them by the Pickett Act, and their claims are wholly invalid.

Not only did the defendants fail to bring themselves within the proviso of the Act, but the record evidence is absolutely against them; and even if the oral evidence of the interested parties could overcome the showing of the record and sustain the claim that the various leases and assignments made after the withdrawal were all a part of a plan entered into before that date, that does not show that there was work going on leading to discovery or anything more than a plan to protect the property from others who might lawfully enter upon and develop it until someone was found who would develop it. Furthermore, it is manifest that if such a defense can be sustained the door will be opened wide to unlimited frauds upon the Government through general testimony as to alleged agreements among the claimants themselves, which the Government will rarely if ever be in a position to contradict.

The Location Invalid as Attempting to Obtain More Acreage than Allowed by Law.

As has been shown in the Statement of Facts, the British-American Company was organized and existing prior to the date the locations were made; and, almost immediately after the locations were made, voted to issue its entire capital stock for the entire 207 locations; and, while that transaction was not made public, the locators transferred all their rights to trustees, who testified that they held for the British-American Company. On its face, this, of course, looks exceedingly like a location made by dummies in the interest of a particular corporation, organized a short time before and taking over the properties as soon as conveniently could be afterward. It certainly would not have appeared differently, if such had been the deliberate plan. The Court, however, found from the oral evidence that the plan to make use of the British-American Company was not adopted until after the locations, and that then it was adopted as a matter of economy and convenience; and that, in his opinion, the evidence "wholly fails to show that the locations were made for and on behalf of the corporation, or that its existence was even known to most of the parties interested therein until after the locations had been made." (R., 198, 199.)

There is no doubt but that such is the purport of the oral evidence; and if it were necessary for the Government to prove that the locations were made for the benefit of the British-American Company, to enable that particular company to acquire title to a larger area of mining land than the law permits, the proof might not be sufficient, although the record so appears and the circumstances point very strongly to that conclusion.

The Government, however, is not so limited, either by the language of its complaint or otherwise. The language of the complaint is:

> The said location notice was filed and posted by or for the sole benefit of the defendant, British-American Oil Company, or for someone else other than the persons whose names were used in said pretended location notice, and the names of the pretended locators above set out were used to enable the defendant, British-American Oil Company, or some person other than said persons whose names were so used, to acquire more than twenty acres of mineral land in violation of the laws of the United States. The said persons whose names were so used in said location notice were not *bona fide* locators, and each of them was without an interest in said location notice so filed, and their names were not used to enable each of them, or either of them, to secure only twenty acres of said land or patent therefor; but each of said persons was a mere dummy fraudulently and unlawfully used for the purposes alleged, all of which complainant is informed and believes, and so alleges. (R., 11-12.)

Although the proof may not be sufficient to show that these locations were made for the British-American Company, it is clearly sufficient to show that they were made "for someone else other than the persons whose names were used," and that those names were used to enable either the British-American Company "or some person other than said persons whose names were so used to acquire more than twenty acres of mineral land in violation of the laws of the United States"; and that "those persons whose names were so used" were "without an interest" in the notices filed and that their names were not used to enable them to secure the twenty acres to which they might have been entitled, but that each of said persons was a mere dummy fraudulently and unlawfully used for the purposes alleged.

As is set forth in detail in the Statement of Facts, 207 locations were made in one night in the names of 21 persons, the majority of whom admitted that they had no interest whatever in the locations, but were acting at the request of friends for some person or organization they knew not whom or what; while the minority, who were members of the groups forming the so-called association or syndicate, admitted that so far as their names were used in making the locations they did not claim or expect

to get any interest as locators, but that their names were used for the syndicate or association in the same way that the names of those who claimed no interest at all were used. (R., 432, 453, 454, 460.)

It is clear, also, that while the plan was gotten up hurriedly, and there had been no opportunity to arrange the details as to the holding of claims, they were all taken up in the interest of a single association or syndicate, not then put in corporate form, but expected to be as soon as they could get to it.

It is submitted that it is a distinction without a difference to say that, because they did not have the particular corporation in mind at the moment the locations were made, but immediately after adopted it for economy and convenience instead of organizing a new one, they were in a better or different position than they would have been in if they had intended to use the particular corporation from the beginning; in the meantime treating and considering the association as a unit, to be put in corporate form, in whose interest a large number of names were used indiscriminately, not for the purpose of acquiring rights for the individual locators, or even for individuals for whom they might be acting as agents, but doing everything in pursuance of a plan to vest as large an amount of

property as possible in a single organization.

It is well settled that where locations are made by a group of persons in the interest of a corporation, they can vest in that corporation no larger acreage in any one location than a single person could take, and no acreage at all where the purpose is to evade the law. It is going very far to permit an easy evasion of the law if it can be held that it is lawful to do this for an organization acting as a unit, provided the corporate form is not given to it until after the location notices are posted.

We are, of course, aware that there are cases which hold that where locators have taken up claims in good faith themselves, and, merely in order to handle it more conveniently, incorporate and retain through the agency of a corporation the same interest which they acquired under the location, such location or transfer to a corporation does not invalidate the location.

> *Borgwardt* v. *McKittrick Oil Co.*, supra, 164 Cal. 650.

This, however, is not one of those cases; the original locators acquired nothing either for themselves or any individuals for whom they were acting. Even those persons who claim an interest and whose names appear on the locations testify that they did not consider that they were getting any particular

share in those locations by reason of the use of their names. They, and all the others, were acting merely for an unnamed and unincorporated organization, which was to take and hold the locations as a unit and be put in proper form as soon as possible.

The Location Was Merely Speculative and Therefore Void.

Perhaps the best way of developing our position upon this point is to quote first the language of the Court below in denying the plaintiff's motion for a rehearing.

> The second ground is that this location and others made for and on behalf of the syndicate, some two hundred in number, were speculations —and by that I understand counsel to mean that it was not the intention of the parties for whose benefit the locations were made to themselves develop the property, but that they made the locations with the purpose and expectation of selling and disposing of some of them to other parties and profiting thereby.
>
> I know of no statutory or other rule that forbids paper locations of this character, and these were but paper locations. They are not such as are recognized by the law of the United States. But the practice seems to have grown up in this country by making such locations and the locator obtaining some rights that were recognized by the community. The courts have recognized their right to sell and dispose

> of their interest under such locations, and the fact that they made them for that purpose would not in my judgment invalidate them. (R., 212.)

With this statement of the law we must squarely take issue. The Court does not deny that the locations were speculative in the sense that even those for whose benefit the locations were made did not intend to develop the property, but made them with the purpose and expectation of selling and disposing of some of them to other parties and profiting thereby; but says that the fact that they made them for that purpose would not in his judgment invalidate them.

That, we submit, is in effect a finding that the locations were made without any purpose to develop, but with the purpose of holding and disposing of them for profit. Whether or not it was so intended the rule applied was on that basis and the evidence will warrant no other conclusion. Neither the locators nor the trustees nor the British-American Company, nor any of its stockholders or subordinate companies, ever did any development work upon any of these 207 locations. Three or four of them were disposed of; the rest dropped. That they contemplated only disposing of them is clear from

the provision of the offer by the trustees to the Company, and accepted at its meeting of February 3, 1908, to convey all the locations to the Company in consideration of all its stock, provided certain organizers might each select a section of land for themselves, and provided further: "And for the further consideration of your agreeing that out of the first proceeds received from the sale of the remaining portion of the said property to be conveyed to you, you shall and will pay the above named parties mentioned as follows, to wit: To Frank R. Strong, $1,000.00; to Stephen W. Dorsey, $500.00; to John P. Jones, $999.90" (R., 394). This clearly shows that their purpose was to hold this immense acreage and make sales of it as opportunity might offer.

The corporate records of the British-American Company, which are pretty fully in evidence, show that there was no intent on its part at any time to develop. It appears from those records that in June and September of 1909 it was recognized that money might have been expended toward "maintaining possession" of or "protecting" certain of the tracts, and that a claim of some sort would be made to secure reimbursement for moneys so spent (R., 405, 411); but there was no effort or purpose to develop them in any way. On the contrary, the evidence

plainly shows that certain stockholders of the company, realizing that the company itself intended to do nothing, took it upon themselves to protect the property and to see if they could arrange in any way with any one who would spend the money for its development. "Maintaining possession" and "protecting," of course, meant keeping off others who had a lawful right to enter upon and develop it. There was good warrant, therefore, for the language of the Court below in defining what he understood to be meant by speculative locations. Our complaint is of the rule of law which was applied to locations of that character.

The mere fact that the attempt was made to make 207 separate locations of 160 acres each at one minute after midnight on the first morning of the year 1908 is in itself a striking circumstance of which the Court cannot but take notice. If it merely appeared that one location was taken up at that time, and in that way, it might have less significance; but when 207 locations are taken up, pursuant to a plan such as was adopted here, the speculative purpose becomes clear beyond all question; and no one could contend that such a wholesale plastering of the land and records with location notices and certificates was with the intent to go to work for the development of all, or any particular

tracts among them all, as was required by law to give the locators any right to retain possession.

> See *Union Oil Co.* v. *Smith,* supra, and cases therein cited.

At a hearing before the Committee on Public Lands of the House of Representatives in May, 1910, while the Pickett Act was under consideration, Mr. Thomas A. O'Donnell, who was put forward as a spokesman by the so-called California Delegation, said:

> "Whole counties have been located under the so-called rights that the locators would have under the placer mining law. * * * In many instances in the little towns on midnight of January 1 almost all of the saloon men, and the men that spend a great deal of their time in these towns, go out and locate the whole county. Then they come and ask for a bonus from the operator." (Printed Report, p. 9.)
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> MR. PICKETT. I should like to ask this question of some one of these gentlemen here who is authorized to speak for the California delegation present: How much or how little (whichever way you want to put it) do you think a man should do upon one of these locations in order to come within the protection of the law?
>
> MR. EWING. Let Mr. O'Donnell answer that. He is the most practical oil man present.
>
> MR. PICKETT. That brings it down to the point in issue.
>
> MR. O'DONNELL. Gentlemen, I do not believe we want to claim anything from the Govern-

ment of the United States out there except on those lands where there is an actual pursuit of discovery. It is hard to determine just where the pursuit of discovery commences; but it has got to be legitimate and continuous. That is the line of all the decisions in all of the cases we have had in California, when a contest has been raised over these lands. The question has been whether a man was continuously working to the end of making a discovery; whether he was building a pipe line to the land, getting his houses ready, providing his material, hauling his machinery on, or whatever it might be —in other words, whether he was legitimately trying to drill a well upon that territory and make his discovery.

I do not believe any of us want to tie up these government lands and hold them for indefinite periods by making some pretense of putting up a derrick or putting up a cabin, or anything of that kind. As a practical man, knowing nothing about law, I should say that if a provision is inserted in this bill following out the line of those decisions and the practice that they have led to, I believe it will protect the interests of those that are expending money in an effort to make these discoveries, and that any pretense to that end will not acquire these lands. (Printed Report, p. 73.)

It is true, as has been said by this and other courts, that Congress has placed no limit upon the number of locations which single locators or groups of locators may take up. (*Consolidated Mutual Oil Co.* v. *United States,* 245 Fed. 521, 523.) But it is also true that the spirit and purpose of the law is to prevent any such wholesale attempt; and

where the purpose is as plain as it is here, the law is not powerless to prevent it.

> The mineral land laws of the United States are extremely liberal in the requirements under which possessory rights may be acquired. The few restrictions imposed are only intended to prevent the primary location and accumulation of large tracts of land by a few persons, and to encourage the exploration of the mineral resources of the public land by actual bona fide locators.
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> *Cook* v. *Klonos*, 164 Fed. 529, 538.

It is contended by plaintiffs that the evidence shows that Hastings was a "professional staker" and that the whole proceeding on the part of Hastings and Stafford with respect to this location was purely speculative. This objection to the location was a question of fact for the jury, which the court properly submitted for its consideration. In *Erhardt* v. *Boaro,* 113 U. S. 527, 536, 5 Sup. Ct. 560, 565 (28 L. Ed. 1113), the Supreme Court said that:

> "It would be difficult to lay down any rules by which to distinguish a speculative location from one made in good faith with a purpose to make excavations and ascertain the character of the lode or vein, so as to determine whether it will justify the expenditures required to extract the metal; but a jury from the vicinity of the claim will seldom err in their conclusions on the subject."
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> *Rooney* v. *Barnette*, 200 Fed. 700, 711.

It is impossible for us to see how locations can be held to be other than speculative, when they were taken up as these were, without any intention

to develop them even on the part of those persons for whose interest they were located, but with the purpose and expectation on their part of selling and disposing of some of them as occasion might offer and of profiting thereby.

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